In the High Court of Punjab and Haryana at Chandigarh

C.R.No. 3770 of 2005
Date of decision: 12-2006

Miss Meera Sharma .....Petitioner

Versus

Jagjit Singh .....Respondent

CORAM: Hon'ble Mr.Justice Vinod K.Sharma.

Present: Mr. Gurpreet Singh, Advocate, for the petitioner.
Mr. Chetan Mittal, Advocate, for the respondent.

VINOD K.SHARMA,J.

By way of present revision petition, the petitioner has challenged the order dated 20-04-2005 passed by the Civil Judge (Jr. Divn.), Chandigarh, dismissing the application moved under Order 14 Rule 2 read with Section 151 of the Code of Civil Procedure by framing a preliminary issue on the question of res judicata and disposing of the same.

The petitioner had filed a suit for permanent injunction restraining the respondent from entering into an agreement, power of attorney and will etc. in respect of plot No.289, Sector 40-A,

Chandigarh bearing L.R.P. No. 2100 measuring 192 sq. yards and further restraining the defendant from alienating the property i.e. plot No.289, Sector 40-A, Chandigarh and from interfering in her peaceful possession and also for grant of mandatory injunction in favour of the petitioner directing the respondent to get the General Power of Attorney, Special Power of Attorney, Will registered as per the agreement to sell dated 14-6-1989.

The learned trial Court, vide its judgment dated 19th of May 1997, came to the conclusion that the respondent herein had entered into an agreement to sell his plot in dispute in favour of the petitioner and documents were duly executed by the respondent in favour of the plaintiff-petitioner. It was also held that in pursuance to the execution of the agreement to sell and other documents, the possession was transferred in favour of the petitioner.

The learned trial Court Court also came to the conclusion that the petitioner was put into possession of the plot in dispute in pursuance to the agreement to sell and she had paid the entire sale consideration. So right was created in favour of the petitioner over the plot in dispute and that the petitioner was entitled to protect her possession over the plot in dispute and permanent injunction in her favour was granted. While granting relief of injunction in favour the petitioner, the other reliefs claimed in the suit were declined.

Against the said judgment, both the parties filed appeals in the Court of District Judge, Chandigarh, which were dismissed vide

order dated 16th May 2000. The respondent herein filed RSA No.3748 of 2000 which was decided on 4th of July 2001 by passing the following order:-

> "I have heard the learned counsel for the appellant and with his assistance, have gone through the record of the case.
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> Learned counsel for the appellant has vehemently submitted that the suit filed by the plaintiff-respondent for permanent injunction was not legally maintainable. He submits that the plaintiff-respondent could file a suit for possession on the basis of specific performance, but she filed a suit for permanent injunction and for mandatory injunction though the relief for mandatory injunction lhas been rightly declined by the Courts below but the decree for permanent injunction could not be passed in favour of the plaintiff-respondent. I am not in a position to subscribe to the arguments raised by the counsel for the appellant because the relief of permanent injunction could always be given to the plaintiff on the basis of the possession and adjudication of the title was not supposed to be gone into.
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> Resultantly, the suit of the plaintiff-respondent to the extent of permanent injunction has been rightly decreed by the Courts below. However, it is made clear

that the observations made by the Courts below shall be confined only with regard to the relief of possession and injunction."

After the disposal of the aforesaid Regular Second Appeal the respondent herein filed a civil suit for possession claiming the following reliefs:-

"Suit for possession of plot No.2189, Sector 40-A, Chandigarh bearing LRP No.2100 measuring 192 Sq.yards and for mandatory injunction directing the defendants to remove the Malba lying therein and for damages/mesne profits at the rate of Rs. 10,000/- per month from the date of filing of the suit till the possession is delivered."

In the said suit, the petitioner herein had filed an application under Order 14 Rule 2 read with Section 151 of the CPC challenging the maintainability of the suit in view of the earlier judgments regarding the decree of injunction granted in favour of petitioner on the strength of documents i.e. Agreement to Sell, Affidavit, General Power of Attorney, Special Power of Attorney and Will and also on account of factum of petitioner having paid the entire sale consideration and the possession having been delivered to her under the agreement to sell. However, the said application was dismissed on the ground that written statement to the suit had not been filed. The petitioner filed the

written statement and moved an application under Order 14 Rule 2 of the CPC claiming therein that an issue regarding res judicata be framed and decided as a preliminary issue. The said application was dismissed vide order dated 20-4-2005 which has been impugned in the present revision petition.

Learned trial court came to the conclusion that in the previous judgment only possession of the petitioner was ordered to be protected against the forcible dispossession of the petitioner and the rest of the matter i.e. concerning the title etc. was not adjujdicated. It also came to the conclusion that prima facie it appeared that the matter involved in that suit concerning the possession on the basis of title had not been finally adjudicated between the parties, so strictly speaking, principle of res judicata enshrined under Section 11 CPC did not appear to be involved. It was also held that question of res judicata involved a mixed question of facts and law and suit could not be disposed of on the basis of issue of res judicata only and the dispute can be decided only after settling all the issues after going through the written statement of the defendants and of course by perusing their respective evidence.

The only question that arises for adjudication in the present case is whether the learned trial court is bound to decide the issue of res judicata after framing the same as preliminary issue or the same is to be decided after the parties are allowed to lead their evidence. Learned counsel for the petitioner contends that the issue of

res judicata can be treated as a preliminary issue and in support of his contention placed reliance on the judgment of this Court in the case of **Mehrban Vs. Punjab Wakf Board, 1998 (2) RCR (Civil) 131**, wherein it has been held as under:-

> " I have given my thoughtful consideration to the submissions made by the learned counsel for the parties and have perused the impugned order. Before dealing with the rival contentions urged by the learned counsel of the parties, it will be relevant to refer to order 14 Rule 2 CPC which reads as under:-
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> > "(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2) pronounce judgment on all issues.
> >
> > (2) Where issues both of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-
> >
> > (a) the jurisdiction of the Court or,
> >
> > (b) a bar to the suit created by any law for the time being in force,
> >
> > and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined and may deal with the suit in accordance with the decision on that issue."

> From Order 14, Rule 2 it is clear that if the Court is of opinion that the case or part thereof may be disposed of on an issue of law only it may try that issue first if that issue relates to either jurisdiction of the Court or a bar to the suit created by any law for the time being in force. Issue No.2 framed in the present suit will fall under sub-rule (2) (b) as it is to the effect "whether the suit is barred by principle of res judicata ?" In Pandurang Dhordi Chougule and others v. Maruti Hari Jaghav and others, AIR 1966 SC 153, a Constitution Bench of the Supreme Court held that a plea of res-judicata was a plea of law which concerns the jurisdiction of the Court which tries the proceedings. In this view of the matter, it becomes clear that the issue with regard to res-judicata can be treated as a preliminary issue under Order 14 Rule 2 (2) even if it involves production of evidence by the parties. The view I have taken finds full support from a decision of this court in the case of Uggar Sen (supra)."

Learned counsel for the petitioner thereafter placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Sulochana Amma v. Narayanan Nair, (1994) 2 SCC 14** wherein it

has been held as under:-

> "It was contended that the remedy of injunction is an equitable relief and in equity, doctrine of res-judicata cannot be extended to a decree of a Court of limited pecuniary jurisdiction. We find no force in the contention. It is settled law that in a suit for injunction when title is in issue for the purpose of granting injunction, the issue directly and substantially arises in that suit between the parties. When the same issue is put in issue in a later suit based on title between the same parties or their privies in a subsequent suit the decree in the injunction suit equally operates as res judicata."

Learned counsel for the petitioner also placed reliance on the judgment of this Court in the case of **Jagdev Singh Vs. Sardarni Prem Parkash Kaur, 2002 (2) CCC 654,** wherein it has been held as under:-

> " If it is presumed for the sake of argument that the review was competent and the order dated 5-5-1995 should have been scrutinised in the light of the various judgments providing that the issue which are issues of mixed questions of law and facts would be treated as preliminary issues, I am of the considered opinion that there is nothing on record which may indicate that the

issues, with regard to limitation, maintainability, court fee and res judicata are not the issues of law. A Constitution Bench of the Supreme Court in the case of Pandurang Dhondi Chougule and others vs. Maruti Hari Jadhav and others, AIR 1966 SC 153 has held that the issue concerning res judicata is an issue of law and, therefore, there is no impediment in treating and deciding such an issue as a preliminary issue. Relying on the afore-mentioned judgment of the Constitution Bench, this Court has taken the view in the case of Mehrban vs. Punjab Wakf Board (supra) and Harinder Kumar (supra) that such like issues can be treated and decided as issues of law under Order 14 Rule 2 (2) of the Code. Similarly, the other issues concerning limitation, maintainability and court fee could always be treated as preliminary issues as no detail evidence is required to be led. Evidence of a formal nature even with regard to preliminary issue has to be led because these issues would either create a bar in accordance with law in force or they are jurisdictional issues. Therefore, even on merits, I have no hesitation in holding that the order dated 5-5-1995 does not suffer from legal infirmity."

Finally, the learned counsel for the petitioner placed reliance on the judgment of the Hon'ble High Court of Orissa in the case of **Ganta Swain and Ors Vs. Kandhuni Gounduni and ors, 1996 (2) CCC 70,** wherein it has been held as under:-

> "It is clear from that language of Order 14, Rule 2(2) that if the Court is of the opinion that out of the issues both of law and fact the case or any part thereof may be disposed of on an issue of law only the Court may in its discretion tries that issue first and deal with the suit in accordance with the decision on the said preliminary issue although it is generally desirable that the trial Court should dispose of all the issues, does not necessarily follow, that an issue which goes to the root of the trial cannot be considered as a preliminary issue. Such an interpretation will defeat the very object of Order 14 Rule 2(2) of the CPC.

On the other hand, Mr. Chetan Mittal, learned counsel appearing on behalf of the respondent has supported the judgment of the learned trial Court on the point that question of res-judicata is a fixed question of law and fact and, therefore, cannot be treated as a preliminary issue. In support of this contention, he placed reliance on the judgment of this Court in the case of **Smt. Ram Kali Vs. Sohan Lal, 1984 RRR 211,** wherein it has been held as under:-

> "6. I have gone through all the judgments referred to by

the parties and find that this matter is fully covered by the Supreme Court judgment in Major S.S. Khanna's case (supra). That judgment has been followed by the Full Bench of the Madhya Pradesh High Court in M/s Ramdayal Umrao Mal's case (supra) as also by S.P.Goyal, J. in M/S Shri Digvijaya Woollen Mill's case (supra). Therefore, these are the two judgments in line with the Supreme Court decision. The judgments cited on behalf of the respondent have not referred to the binding judgment of the Supreme Court in Major S.S. Khanna's case (supra) and, therefore, they of no help. Moreover, they are on their own peculiar facts.

7. Even before me it was not disputed by the learned counsel for the respondent that if evidence has to be recorded on an issue, then it cannot be tried as a preliminary issue in view of the Supreme Court judgment referred to above. The stress of his argument was that only little evidence has to be produced on the issue of res judicata namely, copies of the judgment between the parties and probably the site plan which was filed in that case. As already noticed, facts will have to be gone into in this case under issues 1 and 6 because the specific performance decree is only for a grant of the house which was owned by Ram Lal and not for the whole. The heirs

of Ram Lal now want to protect their possession with regard to the remaining portion of the house and this matter can only be decided after whole evidence is led. Hence, the Court below was in error in ordering the trial of issue No.4 as a preliminary issue."

The learned counsel for the respondent further placed reliance on a Division Bench judgment of this Court in the case of **Bhag Singh Vs. Nek Singh, 1994 (3) RRR 271** to contend that only a pure question of law pertaining to the question of jurisdiction can be decided as preliminary issue where an issue involving a disputed fact and question of law is a fixed question of fact and law, which cannot be treated and decided as preliminary issue without affording the parties opportunity to lead their evidence in support of their contention. Thereafter learned counsel for the respondent placed reliance on the judgment of this Court in the case of **M/S Shri Digvijaya Woollen Mills Ltd. Vs. Mohinder Kumar Jain and another, 1979 PLJ 194** which is to the same effect that a mixed question of law and fact cannot be treated as preliminary issue.

Lastly, the learned counsel for the respondent placed reliance on the judgment of the Hon'ble Supreme Court reported in the case of **Gram Panchayat of Village Naulakha Vs. Ujagar Singh and others, AIR 2000 SC 3272,** wherein the Hon'ble supreme Court was pleased to lay down as under:-

"We may also add one other important reason which

frequently arises under Section 11 CPC. The earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed v. Musa Dadabhai Ummer (2000) 3 SCC 350: (2000 AIR SCW 901 : AIR 2000 SC 1238) where this Court on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for injunction was found or based on the finding on title. Even mere framing of an issue on title may not be sufficient as pointed out in that case."

I have considered the arguments raised by the learned counsel for the parties and find that in the present case the facts are not in dispute and that in the earlier suit filed by the petitioner on the same subject matter, the learned trial Court was pleased to grant permanent injunction restraining the respondent herein from dispossessing the petitioner except in due course of law. The reason for passing of the

said decree was that the respondent by way of agreement to sell had put the petitioner in possession of the property in dispute and, therefore, it was not open to him to dispossess the petitioner except following the due process of law. The facts thus regarding the previous suit are not in dispute. The Hon'ble Supreme Court in the case of **Abdul Rahman Vs. Prasony Bai and another, (2003) SCC 488** has been pleased to lay down as under:-

> " For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order 14 Rule 1 of the Code of Civil Procedure, a civil court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res judicata and/or constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues.

Thus the conjoint reading of judgments relied upon by the learned counsel for the parties, it has to be held that when the facts are not dispute, then it is always open to the Court learned trial Court to treat the issue of res judicata as preliminary issue as the suit can be finally disposed of on the basis of evidence to be recorded on the said issue.

Accordingly, this revision petition is allowed, the

impugned order is set aside and the learned trial Court is directed to frame an issue regarding res judicata and dispose of the same by treating it to be a preliminary issue.

December ,2006 **(VINOD K.SHARMA)**
'dls' **JUDGE**